IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA PACIFIC RAILWAY & TERMINAL COMPANY, a corporation,
Plaintiff and Appellant,

vs.

THE COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation; KATALLA COMPANY, a corporation, and M. K. ROGERS, *Defendants and Appellees.*

No ------

Appeal from the District Court for the District of Alaska, Division No. 1.

REPLY BRIEF

HAROLD PRESTON,
SHACKLEFORD & LYONS and
F. M. BROWN,
Attorneys for Appellant.

Lowman & Hanford Stationery and Printing Co., Seattle, Wash.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALASKA PACIFIC RAILWAY & TERMINAL COMPANY, a corporation, *Plaintiff and Appellant,* vs. THE COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation; KATALLA COMPANY, a corporation, and M. K. ROGERS, *Defendants and Appellees.*	No.------

Appeal from the District Court for the District of Alaska, Division No. 1.

REPLY BRIEF

Appellees in their brief, pages 1 to 12 inclusive, set forth certain alleged facts as appearing of record in this case, and we desire to call the attention of the Court to certain misstatements therein contained. On page 5 (see also page 14) of appellees' brief it is said:

"Katalla is within the limits of the Third Judicial District of Alaska and the office of the clerk of the court of that district is at Valdez. The record does not disclose that these amended articles were ever filed with the clerk of the court at Valdez, the district within which the company was purporting to do business. These amended articles, however, were filed in the office of the clerk of the District Court of the First District of Alaska at Juneau."

It appears from the record in this case, and is uncontradicted, that the amended articles of incorporation of the plaintiff were filed in the office of the clerk of the court at Valdez on March 7th, 1906. (Affidavit of S. A. D. Morrison, Record, pp. 223 to 226.) Set forth in this affidavit appears a telegram from the clerk of the court at Valdez so stating. It appears that the amended articles were adopted and filed with the secretary of the State of Washington on the 24th of February, 1906. From the date given by the clerk of the court at Valdez it appears that a certified copy of these amended articles was filed in his office after their adoption with all diligence considering the distance. Counsel's statement with reference to the filing of these amended articles is unfair in another respect. The record in this case (see affidavit of Morrison, Record, pp. 223-226) shows that immediately after the adoption of the amended articles of the plaintiff, the secretary of the plaintiff company was instructed to transmit copies of the articles to the proper officers in the District of Alaska, and that by mistake, instead of transmitting the copy to the secretary of the territory at Juneau, he transmitted the same to the clerk of the court at Juneau, and the clerk of the court received the same, filed it and had it on file ever since until the 7th of June, 1907, after the commencement of this action, but before the hearing upon this injunction, when said copy of the amended articles was withdrawn from the files of the clerk of

the court and filed with the secretary of the territory of Alaska at Juneau, and endorsed upon the amended articles now on file with the secretary of the territory appears the original endorsement of the clerk of the court at Juneau, showing that these articles were filed with him on the 10th day of March, 1906, shortly after their adoption. And further, it appears that the amended articles were withdrawn from the clerk's files by order of the Court on the 6th day of June, 1907, and thereafter on the 7th day of June filed with the secretary of the territory. A certified copy of these amended articles was filed in the office of the Secretary of the Interior on the 6th day of April, 1906, and on the same day accepted by that office. Certified copies of the original articles of the plaintiff company were filed in May, 1905, in the two proper offices as required by law.

At the end of the first paragraph on page 6 of the brief, counsel quotes in full the language of the endorsement of the Secretary of the Interior upon the plaintiff's map of definite location: "Approved subject to all valid existing rights." It is to be noted that this is the universal form of approval for all railway maps and plats.

In the second paragraph on page 6 of the brief, counsel say:

"The maps (referring to plaintiff's maps of definite location) were retained by the land department without any notation upon its records until the 28th of March, 1907, when it was returned to the local land office at Juneau with a letter from the commissioner directing the register to return the maps to the company for certain corrections pointed out in the letter, and after the maps should have been corrected and returned to the local office, that office was instructed to return the same to the commissioner for further examination."

There is no evidence whatever in the record in this case to substantiate the statement that no notation of this map or its filing was made upon the land office records, and upon this statement, unsupported by the record, counsel bases an argument that the approval of the *secretary* was not effective. In this connection it is pertinent to say that the corrections required by the *commissioner* were clerical corrections, and did not at all touch the merits of the matter or change the location in any manner of the right-of-way as approved.

At the end of the first paragraph on page 7, and also on page 35 of appellees' brief, it is stated that the plaintiff's map of definite location has never been returned to the commissioner of the general land office. The record is silent upon this question. If it is proper for appellees to have incorrectly stated the fact upon a silent record, it is equally proper for us to correct the statement by informing the Court that the map was returned to the general land office very soon after the hearing in this case, at which hearing the map was used before the Court.

At the bottom of the second paragraph on page 7 of the brief the following statement is made:

"No action has ever been taken by the department upon these maps of the terminal grounds. The application of the plaintiff for this terminal tract No. 1B is still pending before the department."

Counsel assumes to state a negative fact simply because the record is silent, and the statement made in its present form is incorrect and misleading. The plat for Terminal Tract No. 1A was approved by the secretary of the interior on the 4th day of September, 1907, and the map of Terminal Tract No. 1B was recommended for approval by the commissioner of the general land office on August 24, 1907,

over the protest of the appellee, Copper River & Northwestern Railway Company, after a hearing before the commissioner.

On page 8 of the brief, at the end of the first paragraph, in speaking of the alleged Standard Oil and Oil King placer claims, counsel say:

"The Alaska Petroleum & Coal Company subsequently purchased both of these claims."

This statement is not in accordance with the record, and is misleading. The fact is that the Alaska Petroleum & Coal Company, according to the record, only purchased an undivided five-eighths interest in the claims. The affidavits on file here cannot be construed in any other way. Henry R. Harriman, secretary of the Alaska Petroleum & Coal Company (Record, pp. 258-261) states that the terminal ground of the plaintiff corporation is situated upon property belonging to the Alaska Petroleum & Coal Company, and this statement alone might lead to the conclusion that the Alaska Petroleum & Coal Company acquired full title to the property. On page 260 of the record he says further in his affidavit: "An abstract of the property owned by this affiant's company, over which the plaintiff's terminal grounds have been located, is hereto attached, and made a part of this affidavit." When counsel introduced in evidence the abstract of title in connection with the affidavit of the officers of the company, they certainly should be bound by such record as appears from their abstract, and the affidavit cannot be construed to assert any greater title than the abstract to which it refers discloses. It appears that the two abstracts of title were introduced as separate exhibits in the trial of the case. (See Record, p. 98.)

The statement on page 8 of the brief, that "in the sum-

mer of 1906 the defendant M. K. Rogers, acting for the Copper River & Northwestern Railway Company, made a verbal contract with the Alaska Petroleum & Coal Company for a right-of-way 200 feet in width across these two mineral claims," has no support in the record. On the contrary, the record (p. 80) shows that all Mr. Rogers did in 1906 was to negotiate in a general way, and that no contract of any kind was made until March, 1907, and that is the date of the deed from the Alaska Petroleum & Coal Company to the defendant railway company. Mr. Rogers' own statement is, in brief, as follows, Record, p. 81:

"The closing up of the negotiations (w)as either in March or April of this year, but we had been negotiating with him before that."

On page 9 of the brief it is asserted that the defendant railway company has amended its articles. This assertion is not supported by any citation to the record, and we have been unable to find any support for it in the record. If the defendant railway company has amended its articles, the effect of the amendment would be a material question, for its amended articles might not be so phrased as to authorize its present location, and would not take effect until and as of the date when same were accepted by the secretary of the interior.

On page 10 of appellees' brief it is stated that defendant railway company is building a branch from Palm Point easterly or southeasterly up Bering River. (We take it northeasterly is meant instead of southeasterly.) There is no evidence in the record that the company is building this line, nor is there any evidence to support the following assertion that it is building a breakwater. (See Record, p. 50.)

On the same page, at the end of the third paragraph, it is said in the brief that the ground extending some 800 feet back from the shore line is lower and level, which statement is correct; but the statement proceeds as follows: "but rises precipitously from that point eastwardly." This statement is misleading. An examination of the maps and photographs in this case will be sufficient to demonstrate that there is a gradual slope toward the north of the terminal tract, which is caused by undulations that are not precipitous.

Counsel's further statement at the end of the first paragraph, on page 11, that the adoption of the suggested line of road passing around Terminal Tract No. 1B would render necessary "heavy cuts" through the "mountains" back of the terminal tract is incorrect. An examination of the maps and the photographs shows that there are no mountains in the immediate vicinity of the terminal tract, nothing more than low foothills, and the greatest elevation to which the defendant railway company's suggested change of line would reach would be about 90 feet. (Record, p. 131.)

The exaggerated view presented (page 11 of appellees' brief) of the hardship which the defendant railway company would be put to if not permitted to forcibly override the pior rights of the plaintiff, and which it would undergo if ultimately required to build around the terminals of the plaintiff instead of through the center of them, is built up upon the very extravagant testimony of Mr. Rogers. That testimony is found at pages 55, 56, 57 and 58 of the record. We ask the court to read this testimony. We believe it to be true that it would cost the defendant railway company more money to build around these terminals, and we also believe it to be true that it would cause a greater operating expense at the identical point. But we

submit that as a matter of common knowledge a grade of less than one per cent., such as the suggested substitute line would involve, is not excessive, but on the contrary is a moderate grade for railway construction. Mr. Rogers' assertion that the maximum grade of the defendant company will not exceed three-fourths of one per cent., it must be remembered, is based entirely upon preliminary reconnoisance and conjecture, and not upon actual experience in the construction of the road.

On page 12 of the brief we find a statement that the testimony shows that for the defendant railway company to build around plaintiff's terminals would render impossible the completion of its twenty-mile section within twelve months. The statement is followed by a blank reference to the record. We have not been able to find any such testimony in the record.

The closing paragraph on page 11 of the brief states that Mr. Rogers made the claim that the projected line of defendant company will be built upon a six-foot embankment, thus carrying the track above the level of the snowfall. We do not know whether it is meant by this that Mr. Rogers would carry his road over the mountains on embankments, but at any rate the testimony in the record in this case shows that immediately to the west of the terminal tract the projected line of the defendant railway company requires a seventy-foot cut for a distance of a mile and a half. (Record, p. 127.)

On page 23 of the appellees' brief is an assertion that the alleged mining claims have been accepted by the government officials and filed and recorded upon the public records. The record does not show any filing of these mining claims, except in the recorder's office of the district, and it does not show that the same have been accepted, for any paper purporting to be a location is upon tender

required to be filed in the office, and the filing of the same is not an acceptance thereof by the government, nor does any record of such filing reach the land records of the government until there is an application for patent, and there is no method known to the law of cancelling such filing.

At pages 24 and 26 of appellees' brief is found a statement relating to the work done upon these oil claims and the expenditures made by the petroleum company in the immediate vicinity. The record shows that the expenditures of the petroleum company have been made at a point three miles distant from these two claims, with the exception of the roofing of one cabin on one of these claims, and possibly the opening of a trail through one or both of them. Each of these claims is supposed to cover 160 acres of ground. This is the maximum showing made in the record of any work ever done toward the development of these two claims, and is based upon testimony of appellees' witnesses viewed in the most favorable light possible. The testimony to the contrary is set out fully in our opening brief. We content ourselves in this connection with the simple statement that the improvements said to have been put upon these claims are not visible to the eye. No attempt has been made to prove any specific assessment work upon either of the claims since the year 1905, except the attempt to prove by M. K. Rogers (Record, pp. 67, 68) that $25,000.00 of machinery had been placed on certain oil claims of the Alaska Petroleum & Coal Company. Mr. Rogers (Record, pp. 67 and 85) admits that there is a break in between certain claims of the Alaska Petroleum & Coal Company, and on cross-examination admits that the word to which he referred as constituting assessment work was the driving of certain wells at a point distant in an air line something like two miles from Terminal Tract No. 1B. Mr. Rogers also admits that Stephen

Birch, an employee of the defendant railway company, had located certain homestead scrip surveys between Terminal Tract No. 1B and the wells which he mentioned in his direct evidence. (Record, p. 85.)

On page 49 of the brief the impression is given the Court that the proposed line of the defendant railway company crosses the terminal grounds of the plaintiff company at grade. The record shows the contrary. It is true that the point where the main tracks would cross each other is at grade of plaintiff's main track, but the defendants' proposed line crossing the terminal will be through cuts and on fills, thereby destroying it as a terminal site.

ARGUMENT.

(Appellees' Point I., p. 12.) The original articles of the plaintiff were filed in exact compliance with the Code of Alaska, Chap. 23, Title III., Act of June 6, 1900; 31 Stat. at Large, 528. This is not disputed. It is contended, however, under this point, that the mistake made in filing the certified copy of the amended articles in the office of the clerk of court at Juneau instead of the office of the secretary of the territory there, postpones all of plaintiff's rights to the date of June 7th, 1907, when this error was corrected. We do not believe that such serious consequences would follow if there were a law requiring the amended articles to be so filed, for the act in question provides its own penalties for non-compliance therewith, to-wit, a money penalty per diem, and the invalidating of contracts entered into by the company at the option of the other contracting party (Sec. 228); but, as appellee says in its own defense at page 65 of its brief, that there is no statute or decision requiring the amended articles to be so filed, but it is sufficient for right-of-way and terminal purposes under the

act of Congress of 1898 if certified copy of the amended articles be filed with the Secretary of the Interior. In fact, the act of 1898 is plain in its terms, to-wit: that a railway company may acquire the benefits of the act by filing a certified copy of its articles with the Secretary of the Interior. The regulations of the department also require compliance with the Code of Alaska in the respect above noted, but that is an additional burden outside of the statute, and of doubtful validity for that reason. Further, the evidence shows that the Secretary of the Interior has approved plaintiff's map filings since it filed with the land department at Washington, D. C., a certified copy of its amended articles. Therefore it is to be taken as true that the regulations of the department have been complied with by appellant in that behalf to satisfaction of the department.

The case of *Washington & Idaho R. R. Co. vs. Coeur d'Alene R. R. Co.,* 160 U. S. 77, holds (and we claim that it holds) that a railroad company can acquire no rights upon lands of the United States under the act of 1898, when its articles filed with the land department show that its terminus named in its articles is different from the terminus described in the map. In the case at bar the defendant railway company's map and its articles show its terminus at Valdez, 100 miles and more distant to the west from its Palm Point terminus, which it describes in the later maps which it has filed in the land department, and that the line of road shown in these maps does not go to Valdez, or within a hundred miles of Valdez.

(Appellees' Point I., 2, p. 16.) The record shows that the whole of the capital stock of the plaintiff was subscribed at the time of its organization. (Record, p. 244.) Overlooking that evidence in the record (and which is uncontradicted) appellees' point is to the effect that because the

stock was issued for what they deem an inadequate consideration, therefore it has never been subscribed. It is squarely stated by appellee (on p. 17) "that the entire capital stock was issued." Under the authorities and in reason the issuance of the stock is equivalent to a subscription for it. If it was issued as fully paid for an inadequate consideration, the holder thereof is liable to the extent of the overvaluation of the property conveyed. The issuance and acceptance of the stock proves its subscription, and the holder thereof cannot deny his subscription.

Upton vs. Tribilcock, 91 U. S. 45.

Webster vs. Upton, 91 U. S. 65.

In addition to the property conveyed upon the issue of capital stock, it appears from the record (and is uncontradicted) that $250,000 had actually been expended by the plaintiff corporation in survey and construction work prior to the date of the hearing. (Record, p. 236.)

(Appellees' Point I., 3, p. 18.) This point is based entirely upon the land grant decisions cited thereunder. In each of those cases the Court had under consideration the question whether a railroad land grant under act of Congress passed title to the railroad company to a certain tract of land upon which there had been at some time a filing or claim made (and which was then of record) by some third party. In each of the acts it was expressly provided that the grant should not carry the land as to which such prior claim was then in existence, and it was in each case because of the exception contained in the act that the law was so declared. We invite an examination of each of the land grant cases cited to support this statement.

The act under consideration in this case does not contain any exceptions whatever. It uses the language "lands

of the United States," and does not speak of vacant lands or unoccupied lands. The plain intent of the act is to give the railroad company the right to lay its route and its stations and terminals over the lands of the United States, even though at some point or points along the length of its line it may run upon a tract upon which some possessory right has been initiated. In such cases, recognizing the fact that the title still remains in the government, it gives the government's consent to the location of the line thereover, and provides a method for the company to acquire the consent of the claimant by purchase or condemnation. The government accepts the map, even though such a condition appear upon its records, but the approval is made expressly subject to existing rights so as to not preclude any honest claimant from receiving from the railroad company due compensation in the premises. It cannot be the intent of the act to require the railroad company to pay for any invalid claim, possessory, declaratory or mineral, and it cannot be the intention of the act to hold up the location of the line until the claim shall have been extinguished, either by adjudication of its invalidity or by payment of compensation to a claimant of a valid claim. The act recognizes that the use to which the land is to be put by the railroad company is a public use to which the possessory private use is subordinate. It cannot be the intent of the act that where a railroad company runs its line and is ready to file its map and thereby acquire the statutory rights, with the view to immediate construction of its road, it must suspend proceedings until it shall have procured the adjudication of invalidity of an invalid claim at some point on its line, or pay for such invalid claim in order to avoid the delay of such an adjudication. The previous policy of the land department, as shown in the case between the *Northern Pacific R. Co. vs. Montana Railroad Co.* has been in such cases to ap-

prove the map of definite location or terminal grounds so far as the interests of the United States are concerned, leaving the question between the railroad company and the adverse claimant for future adjustment between themselves, and thereupon the railroad company succeeds to all of the rights of the United States in and to the lands within the limits of its surveys.

The appellee asserts that the plaintiff is disclaiming any purpose of taking condemnation proceedings. There is no warrant in the record for any such assertion. Appellant is frank to say that it does not intend to pay money for any invalid oil claims. But it is equally determined to prosecute condemnation proceedings if the department or any court should decide that these alleged oil claims have validity as such. The appellant is taking the same course in this case that was taken by the Tanana Mines Railway Company in the case of *Steele vs. Tanana Mines Ry. Co.,* 148 Fed. 678, in which case the Court below and this Court investigated into the discovery and *bona fides* of an alleged placer claim, location notice of which had been filed and was of record prior to the survey of the railway company upon the ground, and we submit that that case is authority for the plaintiff's remaining in possession of the property in controversy, and constructing its road thereupon, in spite of the fact that there was a paper location covering the ground in controversy.

When appellant adopted this land as its terminus it found an existing claim to the land as agricultural land under the soldiers' additional homestead act. That claim was of record in the land office. It bought a relinquishment of that claim. It was informed that there were no existing oil claims covering the land. It could find no evidences of discovery of oil, no evidence of any exploration for oil or doing of assessment work. It made its loca-

tion, made its filings, spent large sums of money. It took peaceable possession of the land, and has brought suit to obtain a temporary injunction restraining a rival company from forcibly dispossessing it and ruining its terminal grounds. The main defense of its rival is a deed from the Alaska Petroleum & Coal Company purporting to convey to it a roving right-of-way over all alleged oil land that it may own (not naming the locations purporting to cover the property in controversy) and it asserts that that deed gave it a right to construct its railroad where it pleases over plaintiff's terminals, even though it should select a route through and crossing midway the terminals of the plaintiff company, which had previously acquired the government right thereto, or at least which had taken the initiatory steps necessary to the acquisition of the right.

It must be borne in mind that on the 23rd of March, 1907, when the defendant railway company secured the blanket right-of-way deed from the Alaska Petroleum & Coal Company, that the plaintiff company was in possession of the ground in controversy, with more than 200 men thereon, engaged in constructing its line of railway, and the approaches to Inner Martin Island; that these men were living in houses constructed upon that ground, and the main camp of the plaintiff railway company was there situate. *No amount of discussion can avoid the fact that the plaintiff company was in actual possession.*

It is clear also that the mining claims of the petroleum company had been forfeited and abandoned prior to the 18th day of March, 1907, upon which date the definite survey of the plaintiff company was approved. There is no evidence whatever in this record of assessment work during the year 1906 or during any portion of the year 1907. Nor is there any evidence of actual occupancy of the property in controversy by the petroleum company or by the

road's map of definite location and the approval thereof by the Secretary of the Interior in January, 1870, such land was not reserved from sale, but passed under the grant, though the records in the land office did not show that the donation claim had been abandoned, and the Court in passing uses the following language:

"'The reason of this is that, as no vested right can attach to the lands in place—the odd-numbered sections within six miles of each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss.'

"The only point of distinction, therefore, as it pertains to grants of land within the primary and those within the indemnity limits, is that, as to the primary, the grant attaches at the date of the filing of the map of definite location of the road and its approval by the Secretary of the Interior, while as to the indemnity lands, it attaches at the date of actual selection by the railroad company and the approval of such selection by the Secretary of the Interior. Any right acquired in or to such lands, whether they be primary or indemnity, whereby they are segregated from the public domain, or, in other words, are appropriated in pursuance of law, anterior to the taking effect of the grant to the railroad company, operates to reserve them from the grant, unless there has been an abandonment of the right and the land has reverted to the public domain in the meantime. This is determined in effect by the case of the *Oregon & California Railroad Company v. United States*, 190 U. S. 186, 23 Sup. Ct. 673, 47 L. Ed. 1012. The grant there, being of indemnity lands, took effect at the date of selection and its approval by the Secretary of the Interior. But it was held that, as it appeared that there had been

an abandonment of the donation by the claimant after the filing of his application and prior to the selection, the land had reverted to the public domain, and became and was subject to the grant; or, in other words, the abandonment having taken place prior to the time of selection, the lands were yet to be deemed public lands, so that they could not be said to be reserved, as it is related to the grant under the act of Congress of 1866. The determination has exact application here, the grant becoming effective by the filing of the approval map of definite location, instead of by selection.

"Judge Ballinger, in the case of *United States v. Oregon & C. R. Co.*, (C. C.) 133 Fed. 953, 954, which was not as strong for the government as this, says:

" 'This claim was of record and uncancelled when the map of definite location was filed, but neither final proof nor payment had been made. The stipulation of facts is silent as to whether Dougherty was residing upon this donation at the time the map of definite location of defendant's road was filed, and without such residence the claim was abandoned. Final proof or continued residence was necessary to the life of this donation. The former is negatived by the stipulation of facts, and there is no presumption in favor of the latter. *Oregon & C. R. Co. v. United States*, 190 U. S. 186. The facts relied upon to except the particular land from the grant must be shown, and in this case they are not shown.'

"But the case of the *Oregon & California Railroad v. United States*, 190 U. S. 186, 23 Sup. Ct. 673, L. Ed. 1012, is controlling, and it is unnecessary to discuss further the matters touching the abandonment of the claim. A reference to that case will disclose the potent and sufficient reasons for the decision, which is conclusive against the right of the plaintiff here to sustain the suit preferred. The bill of complaint will therefore be dismissed at the cost of the plaintiff."

And it has been held under the railway right-of-way act (March 3, 1875,) that wherever the map of location has been approved over mining locations or other possessory

claims under the land laws of the United States, and the same become forfeited, even subsequent to the approval of the map of definite survey, the title thereby forfeited inures to the benefit of the railway company. See

Alexander vs. Kansas City, F. S. & M. R. Co. (Mo.) 40 S. W., page 104.

Bonner vs. Rio Grande S. R. Co. (Col.), 72 Pac. 1065.

There is one other phase of the facts in this case to which the Court should, we think, and will give consideration, viz.: it appears that since the year 1905 it has been a matter of public notoriety that the land in controversy had been surveyed by, and was to be the terminal grounds of, the Alaska Pacific Railway. Plaintiff's terminal maps during all of this time have been of record in the land department of the United States. No mistake could be made as to where the terminal would necessarily be, because it must be located immediately behind the Martin Islands. The Alaska Oil & Petroleum Company has stood by during all this time and allowed the plaintiff to expend many thousand dollars in constructing its line and in preparing to use this spot as its terminals. They have never served any notice upon the plaintiff company; they have made no protest; they have made no effort to interfere with the occupation and preparation of this ground for terminal purposes. We submit that they would be estopped in a court of equity at this time to claim the right of possession of this ground as against the railroad company, and we further submit that on the 23rd of March, 1907, when the defendant railway company secured its blanket right-of-way deed, at the same time the estoppel which existed against the Alaska Petroleum & Coal Company immediately became effective against the railroad company who bought the ground knowing its previous his-

tory, and knowing that it was in the possession and under the improvement of the plaintiff company.

It appears of record in this case, and is uncontradicted (see record, p. 239) that the secretary of the Alaska Petroleum & Coal Company approached Morrison, the manager of the plaintiff company, in the month of March, 1907, and sought to enter into an arrangement with the plaintiff corporation whereby the Petroleum & Coal Company should have a right-of-way across Terminal Tract 1B.

The following proposition seems to be well established by the authorities:

See 15 *Cyc. of L. & P.* 782, Article on Eminent Domain.

"The provision that compensation must be paid, tendered or secured before possession of the land can be taken, is designed for the protection of the land owner, and the requirement may be waived by him," and (quoting from footnote) "asquiescence in the use of the property for the purposes for which it is sought to be acquired."

See also

Kaufman vs. Tacoma, O. & G. H. R. Co., 40 Pac. 137.

"But the respondents saw fit to allow the work to proceed without attempting to restrain the performance of it or recover damages prior to its competition, and thus waived payment in advance, and were confined to their right to bring an action to recover."

See also

Northern Pacific Ry. Co. vs. B. & M. R. Co., 4 Fed. 298.

"When the entry was made and the road in operation, an acquiescence for the shortest period is sufficient to war-

rant a belief that the owner intends to waive all claims except perhaps for damages, which could be assessed as well after as before the entry."

See also

Johnson vs. Hyde, 25 N. J. Eq. 454.

"The person who threatens it is not a mere stranger without claim of right. He is one who, under and in the assertion of a claim of right, proposes to enter upon the complainant's premises of which the latter is in possession, and himself to secure the right of which he alleges he has been deprived. Under the circumstances the defendant should be restrained until his right shall have been established. His legal right is denied by the complainant. The latter insists also that if it existed the defendant has, by his acquiescence made it inequitable for him to assert it. This Court can on the hearing determine the rights of the parties. Into the consideration of the question the fact, character, extent and effect of the acquiescence will necessarily enter." (The above language is taken from the opinion of the Court of Chancery in New Jersey in passing on the granting of a preliminary injunction, where the title of the plaintiff in possession was disputed by the defendant.)

See also

Williams vs. Hutchison & S. Ry., 63 Pac. 430 (Kan.)

The following principle of law is well established, and is clearly laid down in the article on injunctions, by Henry Wade Rogers, 22 Cyc. L. & P. 826:

"When the complainant is in possession and seeks to restrain a trepass *by one who claims under color of right,* the injunction will usually be granted, where the threatened acts may tend to the destruction of the inheritance, or would result in a multiplicity of suits."

See also the case of *Johnson vs. Hyde, supra.*

In the case of *Pa. Co. vs. Ohio River Junction Co.,* 54 Atl. (Pa.) 261, it is said:

"Of course, if the question to be decided depended on in whom is the legal title to the Herrold and Miller tracts, then the power to award an injunction would depend on that decision; but the right to equitable interference turns on answers to these questions: Is appellee a heavy transportation company? Had it a prior location on the land, and was it in possession thereof, conducting a large business, both in its own interests and for the advantage and convenience of the general public? Would the attempt of appellant to assert by force its assumed, but disputed legal right, result in a possible disturbance of the peace, and sudden disruption of business of a common carrier, as well as cause great inconvenience and loss to the public? On the answers to these questions depended the jurisdiction of equity. The chancellor answered them all in the affirmative, and put forth his strong hand to restrain appellant. He was warranted in so doing without regard to the incidental question, in whom was the legal title to the land?"

See also *Santee River Cypress Lumber Co. vs. James et al.,* 50 Fed. 360 (quoting from syllabus, 3rd section):

"Plaintiff, being in possession of a large tract of timber land under color of title, and engaged with numerous laborers in getting out logs for his lumber mill, in which a large capital is invested, and which is dependent upon this tract for a supply of logs, is entitled to a temporary injunction against one who, under claim of title, with force and firearms, enters upon the tract, destroys plaintiff's logging implements, and spreads terror among his workmen; but as a court of equity cannot determine the title to the land the parties will be required to frame an issue of law on that question, to be tried by a jury, pending the injunction."

Applying the above principles to the undisputed fact in this case that the plaintiff is in the actual possession of the property, and that the petroleum company had stood by for over two years and permitted plaintiff to proceed with the development of its railroad, we submit that the Court should protect the possession of this property by injunction pending the litigation, even if the petroleum company had valid claims and it were ultimately necessary to condemn. Certainly these principles, which are applicable to the situation of the petroleum company, are equally applicable to the defendant railway company, which purchased all of the troubles of the petroleum company voluntarily, with notice of our possession and all the other surrounding facts of the case.

Assuming for the sake of argument that there is some measure of validity in the two oil claims in question, yet we submit that the deed in question did not give the appellee railroad company a right to construct its railroad anywhere upon that land, the title to all of which is still in the government.

Teller vs. U. S. (C. C. A. 8th Cir.) 118 Fed. 275, 281.

A *bona fide* mining claimant has a right to the possession of his mining claim, so long as he performs his necessary assessment work in good faith, but that possession is only for his mining purposes. He has the right to dig into the ground, to remove timber, but only for his mining purposes, whether it be for exploration, development or operation. He cannot, however, remove timber or otherwise commit waste upon the claim for any other purposes. He cannot sell the timber on the claim. He could not lawfully make the cuts and fills necessary to build a railroad upon the claim. He cannot give by his deed to any other person any greater rights than he himself has. He

cannot by his deed give to a railroad company a right to build a railroad over his claim. All he can accomplish by his deed to a railroad company is to give his consent that the railroad company build over his claim, and that consent would not vest in the railroad company the right to build its line over the claim unless it shall have obtained the consent of the government by complying with the act of 1898. The deed of the oil company in this case to the defendant railroad company amounts to nothing more than a waiver by the oil company of any claim to compensation from the railroad company under section 3 of the act of 1898.

At the time this consent was given by the deed, plaintiff had taken the initiatory steps which it should do under the act of 1898 to secure the consent of the government to its appropriation of the land for its railroad purposes. The land had become devoted to the public uses of the plaintiff as against any rival railroad corporation which should subsequently seek the consent of the government to use the same for its railroad purposes. The mining claimants could not sell to the rival railroad company any right which would operate to extinguish or would conflict with the previous acquisition by the plaintiff from the government of the right to devote the land to its public purposes. In other words, the appellee railway company, in obtaining a deed from the oil company, took whatever passed by the deed subject to the prior rights of the plaintiff to devote the land to its public uses. If the mining claims were valid, it remained for the plaintiff company to pay the mining claimant the value thereof, arrived at either by agreement or by condemnation proceedings. The principle involved in this contention is sustained and well illustrated in the case cited in our original brief of

Sioux City Ry. Co. vs. Chicago (etc.) *Ry. Co.*, 27 Fed. 770.

Appellees (brief, p. 31) concede the correctness of the principles laid down in that case. Plaintiff company went into possession of the land, made its improvements and expended its money thereon without objection from the oil company. The oil company has as yet, so far as the record in this case discloses, made no objection.

(Appellees' Point II., Brief, p. 34.) It is claimed by the appellees that because no affirmative evidence appears in the record in this case that the lands covered by appellants' application and grant for the right-of-way had been noted on the records of the land office by the register and receiver, therefore the title of the plaintiff company had not vested in the plaintiff, and that therefore plaintiff has no right-of-way upon which it can rest its application for relief in this case. There are two answers to this contention. The first is that when the plaintiff company had performed the last act which it could perform, viz., presented its map of definite location for approval and secured upon such presentation the endorsement of the only official who was authorized to grant the right-of way, the title given by such approval immediately vested, and that the remaining requirements of the act and rules of the department, viz.: the recording upon the records of the department a description of the right-of-way granted, were purely and simply clerical, and have nothing whatever to do with and cannot defeat the rights of the plaintiff company, nor thwart the previously expressed will of the Secretary of the Interior. In support of the appellees' contention the case of *Noble vs. Company,* 147 U. S. 165, is cited. That was a case in which the Secretary of the Interior sought to revoke an approval of a definite survey after he had actually endorsed his approval on the plat, and after the officials of the land department had recorded a description of the land included within the grant.

In that case the Supreme Court of the United States recites in its opinion not only the fact that the plat had been approved, but that the description of the property had been recorded in the books of the land department, and holds that it was not within the power of the secretary thereafter to revoke the grant. The question was not and could not have been involved in that case as to whether or not the approval of the plat itself was a sufficient execution of the grant, and the discussion of the point which counsel now raises was not necessary to the decision of that case, and was not raised in that case. We submit that the approval of the plat constitutes a final action on the part of the Secretary of the Interior, and that title has passed. We submit that the recording the description of the property on the books of the land office is something for the protection and information of the land office, and that the plaintiff is as fully vested with title as if it held an unrecorded deed to the property. In this act, which requires recording, it is no more necessary to the passing of the title that the recording be made than in other cases requiring the recording of conveyances. Counsel's contention is without merit for another reason: Plaintiff in this case had previously filed its preliminary surveys and secured the acceptance of the same. Under the act its rights in the premises were preserved from the time of the acceptance of the preliminary survey and until the secretary should act upon the definite survey, providing the definite survey were filed with the register and receiver within one year after the preliminary survey, and there is no question but what the preliminary surveys of the plaintiff company were in force and effect at the time this action was instituted, even granting the contention of counsel, for the sake of argument, that the approval of the definite survey had not fully taken effect, and in this connection we desire to call attention to the latter portion of section 4 of the

act, which reads as follows: "Any such company, by filing with the Secretary of the Interior a preliminary actual survey and plat of its proposed route, shall have the right at any time within one year thereafter to file the map and profile of definite location provided for in this act, and such preliminary survey and plat shall have the effect to render all the lands on which said preliminary survey and plat shall pass subject to such right-of-way."

And we desire further to call the Court's attention again to the language of section 8: "And in all conflicts relative to the right-of-way, *or other privilege* of this act, the person, company or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right."

(Point III. of Appellees' Brief, pp. 38 to 42 inc.) It is contended by the appellees that the right to land for a station or terminal purposes under the act of 1898 cannot attach prior to the date of the approval of the Secretary of the Interior of the map of definite location, and the notation of such approval upon the public records as required by the act, and impliedly contends that where a railroad company enters upon the possession of a certain tract of ground, surveys it for terminal purposes, clearly defines the boundaries, and causes a plat of such terminal survey to be made and lodged with the land department, it acquires no priority which the courts will protect, and that up until the approval of the definite survey the land is as open to location by competing railway companies or others as if the railway company seeking the ground for terminal purposes had never taken any action looking to the ultimate acquisition of the ground. In this connection counsel cites the case of *Lilienthal vs. Railway Co.*, 56 Fed. 701, decided in 1894 by Judge Ross of this circuit. The facts in the Lilienthal case were as follows: The rail-

way company caused a survey of station grounds to be made and lodged in the department of the interior prior to the declaratory statement of the settler. The survey of the terminal tract was made before the railway company had made any line survey whatever, and the settler in that case filed his declaratory statement prior to the time when the railway company made any survey for its line of road. Subsequently, and long prior to the commencement of the action, the department of the interior accepted the entry of the settler, and issued him a patent to the land in controversy. In the meantime the Secretary of the Interior had also approved the terminal plat after a right-of-way survey had been filed by the railroad company, and it was held by Judge Ross in that case that the settler's rights had been initiated prior to the time when the railroad company was authorized to seek the grant of station grounds, viz.: prior to the time that the railroad company had evinced by proper survey and filing its *bona fide* intention of constructing a railroad, and it was held in that case that no right to station grounds could be initiated prior to the filing of a survey for the right-of-way. But this decision was under the act of 1875. The principal difference between that act and the act of 1898 is that the act of 1898 contemplates a preliminary survey of the land and an initiation (if followed up in accordance with the act) of the rights intended to be granted by the act, and this act, which was passed subsequent to the decision in the Lilienthal case, contains the clause previously quoted by the appellant in its original brief, to which clause no reference has been made by the appellees in their brief. The act of 1875 contained no provision like the provision at the end of section 8 of the act of 1898, and we again quote that provision:

"And in all conflicts relative to the right-of-way or *other privilege* of this act, the person, company or cor-

poration having been first in time in actual survey or construction, as the case may be, shall be deemed first in right."

Following the provisions of this act preserving the priorities of the railroad company which is first in time in survey, it is to be noted that the appellant in this case, when it made its preliminary survey, not only showed thereon its line of right-of-way, but exhibited thereon the location and boundaries of Terminal Tract No. 1B, and actually surveyed the same on the ground, and in due course filed its preliminary survey, which was accepted for filing, and also its plat of Terminal Tract No. 1B. This plat has always been satisfactory to the department. Subsequently its definite survey was actually made upon the ground, and included a survey and a plat of the same exhibiting this Terminal Tract No. 1B. This actual survey of this Terminal Tract No. 1B and filing of preliminary map and actual definite survey of both right-of-way and Terminal Tract No. 1B was made before the appellee railway company did anything in the vicinity of the property in controversy. We call attention to the italicized words in the above-quoted section, "other privileges," and we submit that the clause above quoted preserves to the plaintiff company the priority of its actual surveys on the ground, not only of its right-of-way, but of the terminal tract. In the course of the opinion in the Lilienthal case above cited, Judge Ross used the following language:

"The doctrine of the Yosemite Valley case, 15 Wall 77, and kindred cases, relied on by counsel, does not aid the defendant. In cases like the present, 'the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.' "

It would seem that the latter part of section 8 was passed in order to preserve to companies seeking the ad-

vantages offered by the act the benefit of that general doctrine so often announced by the Supreme Court, that in the acquisition of title to public lands, the first in time shall be deemed the first in right, and the clause above quoted preserves to railway companies that right of priority which is an absolute necessity in order to protect them from the intrusions of rival corporations.

(Appellees' Point III., Brief, p. 42.) Under this point appellees contend that plaintiff below was entitled to no relief in equity because questions of priority between it and the appellee railway company, and it and the oil company, were for primary consideration by the land department, and were there pending. In other words, the contention is that the appellant had no right to go to the courts until the land department had determined these questions between the parties interested therein; that pending that determination plaintiff was not entitled to any protection from the courts against the threatened acts of violation and trespasses of the appellee railway company; that the courts have no right to protect a railroad company which first avails itself of the act of 1898 by surveying and filing against the armed assaults and trespasses of a rival company, until the land department shall have rendered a decision as between the two companies that the first-named company has the priority. Appellees' claim amounts to this: That appellee has the right, by force of arms, to dispossess the plaintiff of its prior possession of this terminal tract, and when called to account, to defeat the jurisdiction of the court of equity on the bill, alleging that the matter is pending in the land department of the government, which department confessedly has no protective process. The statement of the proposition ought

to be enough to answer it. The argument in support of it is based upon citation of the case of

Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S. 301.

But the decision in that case is simply that the courts will not adjudicate the title between competitors for the public lands in advance of a decision thereof by the land department. In the Cosmos case a demurrer to the bill was sustained, and the plaintiff stood upon the bill and appealed from the consequent decree, but did not appeal from the order denying a temporary injunction. The opening sentence in the Court's opinion is as follows:

"An examination of the complainant's bill shows that it does not ask for an injunction until the decision of the land department upon the matters pending therein."

It is true that in this case the bill asks that the plaintiff be adjudged the owner of Tract No. 1B. The Cosmos case cannot be stretched further than be a holding that pending a determination of the question in the land department the Court would not give such a decree which would adjudge plaintiff to be the owner. But in this case the bill also asks for a temporary injunction restraining the defendants from entering upon or encroaching upon or erecting railroad structures upon tract 1B until the further order of the Court. (Record, p. 153) And the order to show cause issued by the Court requires the defendants to show cause why they should not be restrained and enjoined from so entering upon and encroaching upon or erecting railroad structures upon said Terminal Tract No. 1B. So while the plaintiff may not have been entitled to all the relief it asked, nevertheless it was entitled to the temporary injunction, and if upon the final hearing the facts shall be found as they are shown by this record, to a per-

manent injunction restraining the defendants from so entering, encroaching, etc., until the decision of the questions of priority by the land department. This contention is supported directly by the Cosmos case, and also by the case of *Phoenix* (etc.) *Co. vs. Arizona & Eastern R. Co.,* from the Supreme Court of Arizona, 84 Pac. 1097. In this case a physical conflict occurred between two rival railroad companies prior to the approval by the Secretary of the Interior of the maps of location of either, and it was held by the Supreme Court of Arizona that the ultimate question of priority was one which would have to be determined by the land department upon the approval of the plats, and was not a matter which the courts could determine and render final judgment upon. It was held, however, that pending the determination of such a contest in the land department, the Court ought, in the interest of the public as well as in the interest of the company showing the greater immediate equity, upon the application of the company interested, by appropriate temporary orders to protect it in the construction of its road, and in this connection the Court uses the following appropriate language:

"It does not follow, however, that the Court was without jurisdiction to entertain an action between these parties with reference to the occupation of the right-of-way, or to grant some measure of relief to either. Pending the determination by the Secretary of the Interior of the matters being litigated before him it was proper to make such temporary orders with respect to the occupancy and use of the way in controversy as upon an inquiry into the facts the ends of equity demanded. The Court entered a decree which, in effect, amounts to a determination that the appellee has title to the premises in controversy. For reasons pointed out this was erroneous. Further, the Court perpetually enjoined the appellant from taking possession of the premises and from interfering, hindering or

delaying the construction and operation, by the appellee, of a line of railroad thereon. To issue such perpetual injunction was also erroneous. But we may now ascertain whether temporary relief should have been granted to appellee, pending the determination of the litigation before the Secretary of the Interior and pending further orders of the Court, or whether, as appellant contends, such relief should have been granted to appellant. In accordance with our conclusion, we may modify the judgment or enter a different judgment. It is a matter of public interest to facilitate the construction of railroads through this vast territory. The reasons for this interest, founded in the potency of improved transportation in the development of our resources need not be elaborated. One of these two companies should be permitted to proceed with the construction of its road over the ground in dispute pending the controversy before the Secretary of the Interior. Construction of a railroad may properly antedate the filing of the profile thereof. As neither company has yet secured the formal approval of a profile of the section of its road including the strip in controversy, the Court not only may, but ought, in the interest of the public as well as in the interest of the company showing a greater immediate equity, by appropriate temporary orders, to protect one of these two companies in the construction of its road."

This principle is also announced by the Supreme Court of New Mexico in the case of

Arizona & C. R. Co. vs. Denver & R. G. Co., 84 Pac. 1018.

In that case the plaintiff had actually surveyed a line of railroad on the ground, and had made for filing a map and profile thereof, which it had not yet filed, but was just about to file, when the defendant railway company commenced a series of trespasses upon the location of the other corporation, seeking to deprive the latter of its location without due process of law, and threatened to continue such acts for that purpose, and the Court held that

under a bill alleging such a state of facts, the plaintiff would be entitled to injunctive relief, and in this connection uses the following language:

"The defendant further urges that the title to the portions of the plaintiff's alleged location now in question is by the complaint shown to be in dispute between the plaintiff and defendant, and that the former must therefore establish its title at law before it can have the aid of a court of equity to protect it. We do not so interpret the complaint. We understand it to charge that the defendant, having actual notice and knowledge of the plaintiff's interest and rights in the premises, is, unlawfully and without any claim of right, seeking to deprive it of them by a series of wrongful acts already begun and threatened to be continued up to the point of the complete ouster and dispossession of the plaintiff. We come now to the question whether the plaintiff is, on the showing of facts in its complaint, entitled to the relief prayed for, or to any relief. It declares that the defendant is seeking to deprive it of its property, not by condemnation proceedings, or any process of law, but by repeated wrongful acts, which the defendant threatens to continue, and that, unless relief in equity is granted, a multiplicity of suits will result. Such, it seems to us, would be the natural and almost inevitable result. The plaintiff also says it would suffer irreparable damage by what the defendant is doing and threatens to do, with reference to its location. To this the defendant replies that plaintiff has alleged the feasibility of laying out other good locations between the points connected by the location in question here, and suggests that the plaintiff avail itself of that natural condition by taking another route and leaving to the defendant so much of the plaintiff's adopted location as it (the defendant) may care to use. That suggestion may in time commend itself to the plaintiff; but its present position in this cause is that its adopted location is the best possible one between the points referred to, and that it asks the protection of this Court against encroachments upon it by the defendant. The defendant further contends that the plaintiff does not allege

any damage, actual or threatened, which would be beyond money compensation, or the inability of the defendant to make such compensation. It is true that all property is subject to be taken for the public use in the method and for the compensation provided by law, but we are not aware that any one is required to surrender his property to whomsoever may choose to lay violent hands on it, no matter how great the price or certainty of payment. The owner has the right to retain the property itself under such circumstances, and is entitled to the protection of the courts in so doing." (Citing authorities.) "We are of course, now dealing with what may not be the actual facts, but which we must treat as actual and established, so far as they are well pleaded in the complaint, and we think that, unanswered, they are sufficient to establish a liability of the defendant and the right to the relief proyed for."

Whether or not the Court should be disposed to decide the question in conflict between these two rival companies the Court will not hesitate to decide that the record discloses a strong probability of the recognition by the land department of the priorities of the plaintiff. In fact, the lower court expressly recognizes such a probability in the decision filed. If so, a case is certainly made out for the interposition of a court of equity to prevent the threatened trespasses disclosed in the original complaint, partially committed during the pendency of the order to show cause, as shown upon the hearing, and carried even further after the denial of the injunction, as shown by the supplemental bill. The plaintiff was undoubtedly in peaceable possession. Clearly it had first taken proceedings under the act. Certainly its map of definite location had been first approved. Why, then, should a court of equity withhold its arm, and thereby permit the defendant railway company, by the use of a superior force of armed men, to enter upon its terminal tract, make fills and excavations thereon, dispossess the plaintiff of it, thereby rendering it impossible

for the plaintiff to build its terminals, tracks, switches and other structures so necessary for the further construction of its main line?

(Appellees' Fourth Point, Brief, pp. 49 et seq.) The authorities applicable to the question of comparative injury have been so fully set forth, and the question so fully discussed in appellant's previous brief, that we deem it unnecessary to review at length the argument of the appellees upon this point. In this connection, however, we reiterate the statement, and we feel that we are justified by the record in making the same, that the appellees in this case are shown to have been wanton wrongdoers, and that it is evident from the record in this case, and the fact is undisputed, that the defendant railway company is attempting to secure by force, pending the determination of such disputes as it has recently tendered in the land department, a right-of-way over property which it feels that it cannot secure by seeking redress at the hands of the Court. Claim is made on page 51 of the brief that the owner of the mineral claims had been in possession of the ground for years, and had constructed buildings and other improvements thereon. The statement is not borne out by the record. It is evident from the affidavits of Morrison, Bruner, and the testimony of Hampton, which go into detail on this subject, that nobody has been on this ground in the occupancy of the same other than the employees of the plaintiff company during the last two years; that no improvements have been placed thereon, save that a roof appeared on a building during the winter months which had theretofore been without any roof whatever. There is no evidence in this case that the oil claimants were protesting against the possession and claim of the plaintiff to the property in controversy. They have instituted no action to seek occupancy of the property, and the use and

possession of the property for mineral purposes does not seem to have been a matter of importance to the oil claimants. It does not appear that the use of this forty-acre tract for minerals would interfere with any oil operations which could be undertaken on the 320 acres of land embraced in these two mineral locations, and further, it is provided in the first section of the act of 1898 that all mining operations prosecuted within the limits of right-of-way or station grounds shall be so conducted as not to interfere with the property or operations of the railroad.

The defendant railway company in this case seeks to justify its course upon two grounds; first, that it is a railway company, and is building a railway in accordance with the terms of the railway act. Further discussion of this point is unnecessary. It is patent in the face of the record, and from the arguments in the brief, that the defendant railway company has no legal right to be attempting the construction of the railway anywhere within a hundred miles of Terminal Tract No. 1B. The other defense is based upon the deed from the holders of a five-eighths interest in the alleged oil locations, and the most ingenious arguments of counsel are based upon the alleged rights of these oil locators. With what little seriousness the defendant railway company considers the value of the rights which it claims to have acquired under the right-of-way deed is patent from this record. The right-of-way deed was secured of the plaintiff's definite survey, only a very short time before the institution of this litigation, to-wit: on the 23rd day of March, 1907. After the approval, and on May 18th, 1907, counsel for the defendant railway company filed in the department at Washington a protest against the approval of Terminal Tract No. 1B. This was made about two weeks after the filing of the original complaint in this action. In this protest not a word was said of any right

claimed under the right-of-way deed. The protest is based simply upon the allegation that the point in controversy constitutes a canyon, pass or defile. (Record, pp. 376-380.) Which manifestly is a matter for courts only.

Appellees' Point V. (Brief, p. 57) amounts to an assertion that, conceding the plaintiff's priority, the defendant has a right to cross plaintiff's right-of-way at such point as may be selected by the defendant, and that if the plaintiff does not agree with the defendant in that respect, the law gives it the right, by force of arms, to physically make the crossing. This point is fully discussed in the appellant's original brief. The language quoted from the act (pp. 57 and 58 appellant's brief) with reference to grade crossing, is identical with the language construed by Judge Hallett in the case of *Denver & R. G. Co. vs. Denver* (etc.) *Co.,* 17 Fed. 867. It is practically identical with the exception of the provision that the crossing must be a grade crossing, with the language of the constitution of California, construed in the case of

Boca & L. R. Co. vs. Sierra Valley Ry. Co., 84 Pac. 298.

There is little difference between the provisions of this act in respect to grade crossings and the provisions of the act of Montana, construed in the case of

Montana (etc.) *Co. vs. Helena* (etc.) *Co.,* 12 Pac. 916.

In the case of *Seattle & Montana Ry. Co. vs. State,* 7 Wash., p. 150, at page 170, in discussing a similar act providing for crossings, the Supreme Court of Washington uses the following language:

"Cases upon statutes similar to that of ours and that of Indiana are found in" (citing cases) "in all of which

the matter of the points and manner of crossing are treated as, or held to be, matters of judicial determination, and not of arbitrary exercise by the petitioning corporation."

See also:

The fact that the point of crossing so arbitrarily chosen by the defendant company is in the middle of plaintiff's terminal grounds, seems to appellees to be of no consequence.

(Appellees' Point VI., p. 63.) The appellee railway company has no corporate authority to build the line of railway proposed, commencing at Katalla and running thence up the Copper River Valley. Such a line of road cannot properly be denominated a branch of the line described in its articles, which commences at Valdez, 100 miles further west, and runs in an entirely different direction. Furthermore, it appears from the evidence of Mr. Rogers in this case that Valdez has been abandoned as the terminal and Palm Point selected in its place as the Pacific Ocean terminus of the railroad. No contention has ever been made in the pleadings, evidence or otherwise in this case, prior to the appearance of appellees' brief, that the line from Palm Point up the Copper River valley was a branch of any road. (Record, pp. 44-46.) Having, then, no corporate authority to build or operate this line of railway, it receives a right-of-way deed from the oil company, which (as we have before endeavored to show) amounted only to a waiver on the part of the oil company of any compensation to which it might be entitled under the act of 1898, if the oil claims are valid. Upon this state of facts is pleaded the argument of appellees under this heading, and boiled down the argument amounts to a contention that under such circumstances the appellee ought not to be restrained by a court of equity from by force of arms crossing the terminals of the appellant, which is and has

been for years step by step complying with the act of 1898, and spending large sums of money in the actual construction of its road.

(Appellees' Point VII., Brief, p. 66.) The supplemental complaint referred to by the appellees in this portion of their brief was filed in order to have in the record in this case a statement of what had occurred since the refusal to grant the restraining order. The purpose for which it was filed, and the purposes for which it was placed in the record, in accordance with appellant's praecipe, was to exhibit to the Court the present state of the contentions of the plaintiff and defendants in this action. So that if this Court should reverse the order of the lower court, it could intelligently provide in its mandate a restoration of the status quo at the time of the commencement of the action, in case it should develop (as plaintiff contends it has developed) that the defendants have since taken forcible possession of a considerable portion of the property in controversy. The allegations, of course, are subject to refutation, if untrue, in the trial court. In the light of the record in this case the Court will not deem it improbable that the facts therein alleged have transpired. These are not the only physical conflicts to which we have referred in our brief, and counsel's argument that this is the only basis for the statement in the brief that physical conflicts have occurred is entirely incorrect. It is shown in this case that a physical conflict was impending at the time the order to show cause was refused, and during the pendency of that order, and before this hearing, a physical conflict on the eastern side of the tract took place, and another physical conflict was continuing on the westerly side.

ON MOTION TO DISMISS.

After the foregoing portion of this brief was sent to the printer the appellant was served with appellees' mo-

tion to dismiss the appeal in this case, on the ground that the act creating this court, and the amendment of Sec. 7 in said act, passed April 4, 1906, confers no jurisdiction in this court of the appeal.

The jurisdiction of this court over appeals from the district courts of Alaska is not conferred by the act of 1891, referred to in the motion, but by a special act conferring jurisdiction upon this court to review the decisions of the district courts of Alaska, 31 Stat. at Large, 414, Carter's Code of Alaska, Sec. 507. It has been expressly decided by the Supreme Court of the United States in *Coquitlam vs. U. S.*, 163 U. S. 346, that the district courts of Alaska are not district courts of the United States, and that this court does not acquire jurisdiction, nor is its jurisdiction regulated, to review the decisions of the district courts of Alaska by the said act of 1891, under section 7. Now, on the contrary, appellate jurisdiction is so conferred and regulated by the special act above referred to. We suppose that it will be contended in support of the motion that the amendment of Sec. 7 of the act of 1891, passed April 14, 1906, 34 Stat. at Large, 116, by some sort of implication repealed the provisions of the Alaska act, above referred to, which expressly confers jurisdiction upon this court to review orders of the district courts of Alaska denying the application for temporary injunctions. We fail to discover any such implication. The act of 1906 referred to is an express amendment to Sec. 7 of the act of 1891, above referred to. It is so stated in the title and in the body of said act of 1906.

The situation is this: They have a general act creating this court and conferring jurisdiction upon it to review the decisions of the district and circuit courts of the United States. They have a special act conferring jurisdiction upon this court, and regulating the same, to review

the decisions of the district courts of Alaska. If there were any such implication possible from the said act of 1906, it is familiar doctrine that: "Where there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation."

Rosecrans vs. U. S., 165 U. S. 257; 17 S. C. Repr., 304.

The Court will notice in this connection that the provisions of Sec. 7 of the said act of 1891, in reference to the kind of interlocutory orders from which appeals may be taken, have not been changed by any amendment. The amendments of Sec. 7, passed in 1900, and the 1906 amendment referred to in the motion, do not in any respect change the original act in respect of the question presented by the motion to dismiss.

It is to be noted furthermore that the act under which this appeal is prosecuted is an act containing certain peculiar and special provisions not found in the general act of 1891. Appeals can be had in civil causes under the Alaska act where the value of the subject matter exceeds five hundred dollars. The time for appealing from final judgments is one year instead of six months, as in the act of 1891. The time of appealing from an interlocutory order is sixty days instead of thirty days, as in the act of 1891 and its various amendments. Special provision was made in the Alaska act for cases in which temporary in-

junctions were refused, which are not in the act of 1891 or in any of its amendments.

We think it is clear that the act of 1906, referred to in appellees' motion, refers to district and circuit courts, meaning district and circuit courts of the United States as distinguished from territorial district courts.

Respectfully submitted,

HAROLD PRESTON,
SHACKELFORD & LYONS, AND
F. M. BROWN,
Attorneys for Appellant.